In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-528

GARY GILBERT CARLSON AND
THOMAS NORRIS TRUAX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their convictions for mailing obscene matter should be reversed because the jury's guilty verdicts on some counts of the indictment were inconsistent with acquittal on other counts and ignored expert testimony; and that this Court's decisions in *Miller* v. *California*, No. 70-73, decided June 21, 1973, and companion cases[1] rendered 18 U.S.C. 1461, under which they were convicted, unconstitutional.

Following a jury trial in December 1972, in the United States District Court for the Central District of California, petitioners were convicted on three counts of mailing

---

[1] *Paris Adult Theatre I* v. *Slaton*, No. 71-1051; *United States* v. *Orito*, No. 70-69; *United States* v. *12 200-ft. Reels of Super 8 mm Film*, No. 70-2; *Kaplan* v. *California*, No. 71-1422.

obscene advertisements in violation of 18 U.S.C. 1461. They were each sentenced to three concurrent two-year prison terms. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner Carlson, under the assumed names of Ralph Martin and Ralph Miller (R. T. 46-47, 392), and petitioner Truax operated a mail-order pornographic film business from offices in Torrance and Inglewood, California (R. T. 50, 56-58, 69-74, 99-104, 113-115, 138, 144-151; Gov. Exhs. 1, 5, 7B-7C). On May 9, 1972, petitioners rented an office at 1626 Centinela Avenue, Inglewood, California, and until November 1972, received mail at that office under the name of Ralph Miller (R. T. 99-105, 108-109). On June 1 and 2, 1972, three private citizens from different parts of the country received unsolicited advertisements for pornographic films from Ralph Miller, return address 1626 Centinela Avenue, Inglewood, California (R. T. 118-120; Gov. Exhs. 18-20). The advertisements consisted of a list of erotically suggestive film titles and an order blank and, on the other side of the page, a collage of explicit pictures depicting males and females engaged in various sexual acts (Gov. Exhs. 18-20).

The government presented two expert witnesses. Father Morton A. Hill, who served on the Presidential Commission on Obscenity and Pornography, testified that the advertisements violated community standards relative to the picturing of explicit sex acts (Tr. 213-216). Dr. Blaine McLaughlin, a psychiatrist who had done considerable work in the field of behavior in sexuality, applied the standards of *Roth* v. *United States*, 354 U.S. 476, to the advertisements and testified that, taken as a whole, they would appeal to the prurient interest of the average individual, that they offend national standards relating to the picturing of explicit

sex acts, and that they were utterly without redeeming social value (R. T. 300-306).

1. Petitioners' contention that their convictions should be reversed because the jury's guilty verdict on three of the counts is inconsistent with its acquittal on other counts was properly rejected by the court of appeals, in an opinion (Pet. App. A) on which we rely. Furthermore, even if the jury's verdict is inconsistent with the expert testimony, as petitioners allege, it is not invalid. This Court recently held in *Paris Adult Theatre I* v. *Slaton, supra,* that expert testimony was not required in obscenity cases when the obscene materials are placed in evidence, as they were here. Since the jury may determine the obscenity of materials without expert testimony, it is free to accept, reject or disregard, in whole or in part, any expert testimony presented on that issue.

2. Petitioners further contend that this Court's recent decision in *Miller* v. *California,* No. 70-73, decided June 21, 1973, and companion cases, rendered 18 U.S.C. 1461, under which they were convicted, unconstitutional. This Court in *United States* v. *12 200-ft. Reels of Super 8 mm Film, No. 70-2,* slip op. at 7, fn. 7 (decided June 21, 1973), held that the *Miller* standards were applicable to federal legislation; and that with respect to the constitutionality of federal obscenity statutes using the terms "obscene", "lewd", "lascivious", "filthy", "indecent", or "immoral" to describe regulated material, it would "construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller* v. *California, supra* [slip op. at 10-11]." Thus, this Court has already construed the terms used in federal obscenity statutes such as 18

U.S.C. 1461, and found that they meet the constitutional requirements set out in *Miller*.

This Court did not indicate in its opinion in *Miller* or its companion cases that the *Roth-Memoirs*[2] standards for judging obscenity, under which petitioners were convicted, allowed unconstitutionally stringent limitations on expression. Rather, the Court expressed its concern that since *Roth*, there had not been a single majority view as to the proper standards for testing obscenity. *Miller, supra*, slip op. at 7-8, 14-15, citing as an example, *Redrup* v. *New York*, 386 U.S. 767. By setting out definite standards in a majority opinion, the Court sought to give lower courts a reliable test by which they could judge obscene materials without being dependent upon the individual views of the Justices.

In cases subsequent to *Miller*, this Court has remanded to the courts of appeals, not the district courts, with explicit instructions to reconsider in the light of *Miller*. See, *e.g.*, *United States* v. *Palladino*, No. 72-1446, and *Ewing* v. *United States*, No. 71-182 (vacated and remanded, June 25, 1973); *Groner* v. *United States*, No. 72-1731, and *Harding* v. *United States*, No. 72-1646 (vacated and remanded, October 23, 1973). These actions indicate that this Court intended defendants convicted under the old standards to have the benefit of an independent appellate constitutional judgment under the new constitutional standards. It does not support petitioner's contention that this case should be retried under the new standards (Pet. 8).

The question whether a particular work is obscene involves a constitutional judgment which must be made

---

[2] *Memoirs* v. *Massachusetts*, 383 U.S. 413.

by the appellate court. *Jacobellis* v. *Ohio,* 378 U.S. 184, 188. In cases in which courts of appeals have had an opportunity to review, under *Miller* standards, convictions obtained under *Roth-Memoirs* standards, they have not remanded to the district courts, but instead reevaluated the material involved, applying the new *Miller* standards, and affirmed the convictions. See, *e.g., United States* v. *Millican,* No. 73-1734 (C.A. 5, October 18, 1973); *Brown* v. *United States,* No. 71-1759 (C.A. 4, September 18, 1973); *United States* v. *Miller,* 482 F. 2d 1379 (C.A. 9); *Miller* v. *United States,* No. 23,935 (C.A. 9, August 6, 1973); *United States* v. *DePriest,* No. 72-1218 (C.A. 9, July 23, 1973); *United States* v. *Sians,* 481 F. 2d 1406 (C.A. 7). But see *United States* v. *Henson,* No. 73-2063 (C.A. 9, October 5, 1973), in which the government's petition for rehearing *en banc* is pending.

The court below has already had an opportunity to consider the materials herein under the *Miller* standard, and has affirmed the convictions.[3] Its failure to refer to *Miller* in its brief opinion presumably reflected the obvious obscenity of the material under any standards.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

---

[3] Briefs of the parties below were submitted before *Miller* was decided, but *Miller* was raised and considered on oral argument.

[4] See the government's Brief in Opposition in *Hamling, et al.* v. *United States,* No. 73-507 (filed December 7, 1973).